

(DUE by EXECUTORS.)

twixt fums bearing interest and not bearing interest as to this particular. Executors have, oftener than once, been found liable for allowing the funds to lie out upon interest; a decree is not reckoned sufficient execution; and consequently, if the debtor prove insolvent, the executor must make good the debt.

Inspecting the records of the Commissary-court, and the decrees of exoneration there found without number, in no case was interest ever decerned or so much as demanded. This shews the universal sense of the nation as to this point.

' Found the Earl of Rosebery, the executor, not liable for the interest of the fums uplifted by him.'

N. B. The pursuers reclaimed, giving up in a good measure the general point; but insisting upon several articles of malversation committed by the Earl in the execution of his office; upon which ground, they said, interest ought to be due *nomine damni*. Answers having been given in, interest was found due from a certain period *retro*. This judgment was founded upon the special circumstances of the case, without intention to alter the foregoing interlocutor pronounced upon the abstract point.

Inspecting the law of England, I observe it to be a rule there as with us, that an executor is not liable for interest. But of late years the Court of Chancery has begun to find interest due. The reason given is, that the objection of the executor's running the risk of the money he lends out, vanishes where a man may insure his money for one *per cent*. See General Abridgement of cases in Equity, p. 238. § 23.

This argument was not moved for the pursuers; and it is uncertain what influence it might have had. As the intercourse betwixt the two parts of the united kingdom is daily opening more and more, it is probable that we will follow the judgments of the Court of Chancery in this particular; for which there are two reasons: *1mo*, The opportunity of insuring in Scotland as well as in England. *2do*, Our respect to the judgments of the House of Lords; which, in an appeal, would probably be directed by the practice of the Court of Chancery.

Rem. Dec. v. 2. No 79. p. 123.

1758. January 4.

ARCHIBALD ARBUTHNOT and OTHERS *against* LIEUTENANT ROBERT ARBUTHNOT.

ROBERT ARBUTHNOT, on the 15th of February 1752, executed a testament in England, by which he gave to his wife the liferent of his whole estate; and, failing children, divided his fortune into legacies to his wife and certain other persons his relations: Mary Arbuthnot, his wife, he named executrix of his will. He died soon after.

No 75.

An executor, by the later practice of England, is liable for interest.

No 76.

A legatee found entitled to the profit arising upon his share of the defunct's

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No 76.
funds, as well
as to the lega-
cy itself.

His only child died on the 27th of July 1753; and his wife also died in March 1754, having first made a settlement in favour of her sister Mrs Elifabeth Arbuthnot; who having likewise died, Lieutenant Arbuthnot succeeded to her as nearest of kin.

The testator's estate, at the time of his death, consisted of L. 932 : 8s. of South-Sea, Bank, and India annuities; and he had also L. 187 due to him by two moveable bonds, and L. 115 not bearing interest.—His debts amounted to L. 162; so that the debts exceeded that part of the executry which did not bear interest in L. 47.

Mary Arbuthnot, the executrix, sold part of the South-Sea, Bank, and India annuities before her death; but did not uplift the moveable bonds.—Elifabeth, her sister, sold the remainder of the stocks

Archibald Arbuthnot, and the other legatees, insisted against Lieutenant Arbuthnot, as representing the executrix, That they were not only entitled to the legacies specified in the will, but to the interest from the time of the wife's death, the life-rent, which would have fallen due upon them if the testator's funds had been allowed to remain in the stocks; for that there was no necessity to have sold out more than was wanted to pay off the L. 47 remaining of the testator's debts, after applying his funds which did not bear interest.

In support of this claim, the legatees *contended*, That an executor is liable for annualrent of sums mentioned in the inventory as bearing annualrent, which had been decided 26th of June 1705, Robertson against Baillie, No 73. p. 533. And, at any rate, the division of the testator's funds ought to be considered as taking place at the time of his death; and therefore the legatees ought to receive their part of the funds with all the profits attending it.

Answered, Interest, by the law of Scotland, is not due *nisi ex lege vel pacto*; and there is no law by which legataries are entitled to any more than the sum legated, and they have themselves to blame, if they do not recover payment immediately after the legacies become due. Nor does an executor find caution to make payment of any interest upon the sums confirmed. The nearest of kin may indeed have a claim in equity for interest upon such of the funds as bore interest to the defunct himself; but this will not apply to the case of a legatee.

'THE LORDS found, That that part of the defunct's estate which was disposable by testament, is to be divided, at the widow's death, proportionally amongst the legatees; and that each legatee is entitled to a proportion of the sums bearing interest at the testator's death, with the interest thereof from the widow's death.'

A.G. *Johnstone.*Alt. *Lockhart.**Fol. Dic. v. 3. p. 30. Fac. Col. No 80. p. 143.**W. Johnstone.*